A

Public Prosecutor v Maxland Sdn Bhd & Anor

B HIGH COURT (SANDAKAN) — CRIMINAL APPEAL NO SDK-42LB-1/3 OF 2022
CELESTINA STUEL GALID J
7 JULY 2022

C *Criminal Procedure — Appeal — Appeal against discharge and acquittal — Respondents were charged under ss 20(2) and 23(2) of Forest Enactment 1968 — Sessions court discharged and acquitted respondents at end of defence case — Whether sessions court judge erred in having accepted defence of respondents and concluding that they had raised reasonable doubt in prosecution's case*

D

This was an appeal against the decision by the sessions court in discharging and acquitting the first and second respondents at the end of the defence case. The respondents had been jointly charged on two counts, each under ss 20(2) and 23(2) of the Forest Enactment 1968 ('the Enactment'). The Ranau District E Forestry Officer ('PW3') received information from a non-governmental organisation which suspected that there had been an intrusion in the Trus Madi Forest Reserve ('FMU5') area. The next day, PW3 and his team observed signs of logging activities at the site of the complaint. PW3 found that the logging activities had encroached into the FMU5 area and later lodged a police report. F The Chief Forestry Assistant of Mukim Mangkawagu, Forest Ranger together with the Tongod District Forestry Officer went to the site and later confiscated the felled logs and two excavators suspected to be involved in forest offences. A detailed investigation in the field later confirmed that there had been illegal logging activities. 503 tree stumps were found in the Trus Madi Forest Reserve G while 54 stumps were found in Kampung Lalampas, State land area. The investigation also revealed that the access road to the illegal logging sites originated from the logging area licensed to one Kekal Eramaju Sdn Bhd ('KESB') and there were no other logging roads or any other roads. KESB's logging area was either adjacent or was situated next to the boundary lines of H the two areas which had been encroached. KESB was the holder of temporary occupation license to log in an area of 10,000 acres (later 7,6652.88 acres after surveyed) of the State land in Kampung Lalampas, Tongod. Subsequently, KESB sold all its shareholdings to Sinora Sdn Bhd ('Sinora'). KESB entered into an agreement with Sinora to sell all of the logs in their licensed area. Sinora I appointed the first respondent as its contractor to log in the KESB's licensed area. The first respondent in turn appointed the second respondent as the subcontractor to log in compartment No 6 of KESB's licensed area. According to the respondents, the second respondent further appointed Sykt Jadigaya Enterprise ('Jadigaya') to log in the said compartment No 6 as its contractor.

The learned sessions court judge ('LSCJ') had, at the end of the prosecution's case, found that a prima facie case had been established. However, the LSCJ was highly persuaded by the testimony of DW4 who gave evidence that the two excavators were owned and registered under Sykt Mekar Mulia ('Mekar Mulia') a business owned by DW4 and not under either of the respondents. According to the LSCJ, the respondents managed to raise reasonable doubt on the prosecution's case, namely that the respondents were not the parties physically working at the site where the logs were felled. The respondents were discharged and acquitted and hence, this appeal.

Held, allowing the appeal:

(1) There was no reference to Jadigaya during the prosecution's case. It was only when DW1 took the stand that Jadigaya was first referred to. Neither was it suggested to any of the prosecution's witnesses that the two excavators belonged to Mekar Mulia. Similarly, Mekar Mulia was only mentioned when DW1 testified. By the terms of the agreement between the first and second respondents whereby the first respondent appointed the second respondent as the subcontractor to carry out logging works in KESB's licensed area, notwithstanding the registration of the two excavators under Mekar Mulia, the custody and control of the two excavators were with the respondents. If indeed the respondents had nothing to do with Mekar Mulia or Jadigaya, it begged the question why they agreed to contractually bind themselves to not just any excavators but the very two excavators which were later found to have been on site where the illegal felling was. The charges were for the felling of the 503 and 54 trees in the forest reserve and the state land respectively for which neither KESB, Sinora nor the respondents were authorised under the Enactment. Thus, the contention that the charges did not mention that the respondents were working or operating outside the boundary of KESB's licensed area was misconceived. The contention that the evidence led by the prosecution did not prove the charge was without merits. All the ingredients of the charges had been made out and the LSCJ had erred in concluding that the respondents had, by their evidence, raised reasonable doubt in the prosecution's case. Therefore, the respondents were covicted of the charges preferred against them (see paras 38, 51, 56–57, 59 & 60).

(2) The respondents were sentenced: (a) as regards the first charge under s 20(2) of the Enactment, a fine of RM400,000; and (b) as regards the second charge under s 23(2) of the Enactment, a fine of RM150,000. In addition, the seized two excavators were forfeited and the respondents were to pay to the Government the cost of rehabilitation of the forest reserve and the state land under s 34(e) of the Enactment (see paras 89–90).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan mahkamah sesyen yang melepaskan dan membebaskan responden pertama dan kedua pada akhir kes pembelaan. Responden telah didakwa bersama atas dua pertuduhan, setiap satu di bawah s 20(2) dan 23(2) Enakmen Hutan 1968 ('Enakmen'). Pegawai Perhutanan Daerah Ranau ('PW3') menerima maklumat daripada pertubuhan bukan kerajaan yang mengesyaki berlaku pencerobohan di kawasan Hutan Simpan Trus Madi ('FMU5'). Keesokan harinya, PW3 dan pasukannya melihat tanda-tanda aktiviti pembalakan di tapak aduan. PW3 mendapati aktiviti pembalakan telah menceroboh kawasan FMU5 dan kemudiannya membuat laporan polis. Ketua Pembantu Perhutanan Mukim Mangkawagu, Renjer Hutan bersama Pegawai Perhutanan Daerah Tongod telah pergi ke tapak dan kemudian merampas kayu balak yang ditebang serta dua jengkaut yang disyaki terlibat dalam kesalahan hutan. Siasatan terperinci di lapangan kemudian mengesahkan terdapat aktiviti pembalakan haram. 503 tunggul pokok ditemui di Hutan Simpan Trus Madi manakala 54 tunggul ditemui di Kampung Lalampas, kawasan tanah Negeri. Siasatan juga mendedahkan bahawa jalan masuk ke tapak pembalakan haram itu berasal dari kawasan pembalakan yang dilesenkan kepada Kekal Eramaju Sdn Bhd ('KESB') dan tiada jalan pembalakan lain atau mana-mana jalan lain. Kawasan pembalakan KESB adalah sama ada bersebelahan atau terletak bersebelahan dengan garisan sempadan dua kawasan yang telah diceroboh. KESB merupakan pemegang lesen pendudukan sementara untuk pembalakan di kawasan seluas 10,000 ekar (kemudian 7,6652.88 ekar selepas diukur) tanah Negeri di Kampung Lalampas, Tongod. Selepas itu, KESB menjual semua pegangan sahamnya kepada Sinora Sdn Bhd ('Sinora'). KESB memeterai perjanjian dengan Sinora untuk menjual semua kayu balak di kawasan berlesen mereka. Sinora melantik responden pertama sebagai kontraktornya untuk pembalakan ke kawasan berlesen KESB. Responden pertama pula melantik responden kedua sebagai subkontraktor untuk pembalakan ke petak No 6 kawasan berlesen KESB. Menurut responden, responden kedua seterusnya melantik Sykt Jadigaya Enterprise ('Jadigaya') untuk pembalakan ke petak No 6 tersebut sebagai kontraktornya. Hakim mahkamah sesyen yang bijaksana ('HMS'), pada akhir kes pendakwaan, mendapati bahawa kes prima facie telah dibuktikan. Bagaimanapun, HMS amat yakin dengan keterangan DW4 yang memberikan keterangan bahawa kedua-dua jengkaut itu dimiliki dan didaftarkan di bawah Sykt Mekar Mulia ('Mekar Mulia') sebuah perniagaan yang dimiliki oleh DW4 dan bukan di bawah mana-mana responden. Menurut HMS, responden berjaya menimbulkan keraguan munasabah terhadap kes pendakwaan, iaitu responden bukanlah pihak yang bekerja secara fizikal di tapak di mana kayu balak ditebang. Responden telah dilepaskan dan dibebaskan dan oleh itu, rayuan ini.

Diputuskan, membenarkan rayuan:

(1) Tiada rujukan kepada Jadigaya semasa kes pendakwaan. Hanya apabila DW1 memberi keterangan apabila Jadigaya pertama kali dirujuk. Juga tidak dicadangkan kepada mana-mana saksi pendakwaan bahawa kedua-dua jengkaut itu adalah milik Mekar Mulia. Begitu juga Mekar Mulia hanya disebut ketika DW1 memberi keterangan. Dengan syarat perjanjian antara responden pertama dan kedua di mana responden pertama melantik responden kedua sebagai subkontraktor untuk menjalankan kerja-kerja pembalakan di kawasan berlesen KESB, walaupun pendaftaran kedua-dua jengkaut di bawah Mekar Mulia, hak penjagaan dan kawalan daripada dua jengkaut itu bersama responden. Sekiranya responden tidak mempunyai sebarang kaitan dengan Mekar Mulia atau Jadigaya, ia menimbulkan persoalan mengapa mereka bersetuju untuk mengikat diri secara kontrak bukan hanya mana-mana jengkaut tetapi dua jengkaut yang kemudiannya didapati berada di tapak penebangan haram itu. Tuduhan adalah bagi penebangan 503 dan 54 pokok di dalam hutan simpan dan tanah negeri masing-masing yang mana KESB, Sinora mahupun responden tidak diberi kuasa di bawah Enakmen. Justeru, dakwaan bahawa pertuduhan tidak menyebut responden bekerja atau beroperasi di luar sempadan kawasan berlesen KESB adalah salah. Pendapat bahawa keterangan yang diketuai oleh pihak pendakwaan tidak membuktikan pertuduhan adalah tanpa merit. Semua elemen pertuduhan telah dibuktikan dan HMS telah terkhilaf membuat kesimpulan bahawa responden telah, melalui keterangan mereka, menimbulkan keraguan munasabah dalam kes pendakwaan. Oleh itu, responden telah disabitkan dengan pertuduhan yang dikenakan terhadap mereka (lihat perenggan 38, 51, 56–57 & 59–60).

(2) Responden telah dijatuhkan hukuman: (a) berhubung pertuduhan pertama di bawah s 20(2) Enakmen, denda RM400,000; dan (b) berkenaan pertuduhan kedua di bawah s 23(2) Enakmen, denda RM150,000. Di samping itu, dua jengkaut yang dirampas adalah dilucuthakkan dan responden perlu membayar kepada kerajaan kos pemulihan hutan simpan dan tanah negeri di bawah s 34(e) Enakmen (lihat perenggan 89–90).]

Cases referred to

Agudosi Ikenna Emmanuel v PP [2016] 2 MLJ 596, CA (refd)
Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209, FC (refd)
Asia Ikhlas Sdn Bhd v PP (Criminal Appeal SDK-42S-6/11 of 2015) (unreported), HC (refd)
Dunlop Malaysia Industries Bhd v PP [1985] 1 MLJ 313 (refd)
Edward Goh Geok Seng v PP [1995] MLJU 539, HC (refd)
Mohamed Abdullah Ang Swee Kang v PP [1988] 1 MLJ 167, SC (refd)
Pendakwa Raya v Norizdham Faridzuan bin Yazet [2016] MLJU 307, HC (refd)

Periasamy a/l Sinnappan v Pendakwa Raya [1996] 2 MLJ 557; [1996] 3 CLJ 187, CA (refd)
PP v Abdul Rahman Mohamad [2005] 1 CLJ 700, CA (refd)
PP v Kasihku Sdn Bhd [1991] 3 MLJ 116, HC (refd)
PP v Lam Tshin Po & Ors [1995] 4 MLJ 178; [1995] 4 CLJ 624, HC (refd)
PP v Mohamed Danny bin Mohamad Jedi [2018] 6 MLJ 383, CA (refd)
PP v Prolific Yield Sdn Bhd [2021] 10 MLJ 637; [2021] 6 CLJ 294, HC (refd)
PP v Ravindran & Ors [1993] 1 MLJ 45, HC (refd)
PP v Sulaiman bin Ahmad [1993] 1 MLJ 74, HC (refd)
PP v Wan Razali Kassim [1970] 2 MLJ 79; [1970] 1 LNS 121, FC (refd)
R v Ipeelee [2012] SCC 13, SC (refd)
Tan Sri Abdul Rahim bin Mohd Noor v PP [2001] 3 MLJ 1, CA (refd)
The Coastal Bus Co Ltd v PP [1962] 1 MLJ 324 (refd)
UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor [2018] supp MLJ 363; [2010] 9 CLJ 785, FC (refd)
Youganesparan a/l Muniandy v PP [2021] MLJU 297, HC (refd)

Legislation referred to

Criminal Procedure Code s 316
Environmental Quality Act 1974 s 43
Forest Enactment 1968 (No 2 of 1968) ss 20, 20(2), 23, 23(2), 32(1), (2), 34, 34(d), (e), 37(1), (10), 38(8), (11)
Interpretation and General Clauses Enactment 1963

Ng Juhn Tao (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Ronny Cham (Ronny Cham & Co) for the respondents.

Celestina Stuel Galid J:

INTRODUCTION

[1] The prosecution appealed against the decision by the sessions court in discharging and acquitting the first and second accused (collectively referred to as 'the respondents' unless specified otherwise) at the end of the defence case. The respondents had been jointly charged on two counts, each under ss 20(2) and 23(2) of the Forest Enactment 1968 ('the Enactment').

[2] The charges read as follows:

Pertama

Bahawa kamu, diantara lebih kurang 05hb September 2016 sehinggga 19hb November 2017, tanpa kebenaran atau lesen yang sah di bawah Enakmen Hutan 1968 telah menebang sebanyak 495 pokok balak dalam Hutan Simpan Trus

Madi, dalam daerah Tongod, Negeri Sabah. Oleh yang demikian, kamu telah melakukan kesalahan di bawah Seksyen 20(2) Enakmen Hutan 1968 dan boleh dihukum di bawah seksyen yang sama.

Kedua

Bahawa kamu, diantara lebih kurang 05hb September 2016 sehinggga 19hb November 2017, tanpa kebenaran atau lesen yang sah di bawah Enakmen Hutan 1968 telah menebang sebanyak 58 pokok balak dalam kawasan Tanah Kerajaan di Kampung Lalampas, dalam daerah Tongod, Negeri Sabah. Oleh yang demikian, kamu telah melakukan kesalahan di bawah Seksyen 23(2) Enakmen Hutan 1968 dan boleh dihukum di bawah seksyen yang sama.

[3] The words '495 pokok' and '58 pokok' in the first and second charges were later respectively amended to '503 pokok' and '54 pokok'.

[4] The provisions under which the respondents were charged are reproduced below:

Section 20(2)

Unless expressly authorized by or under the provisions of this Enactment, any person who cuts, collects, converts, fells, or removes any forest produce in a Forest Reserve shall be guilty of an offence and on conviction shall be punished with a fine not exceeding five hundred thousand ringgit and to imprisonment for a term which shall not be less than one year but shall not exceed twenty years.

Section 23(2)

Unless expressly authorized by or under the provisions of this Enactment, any person who cuts, collects, converts, fells, or removes any forest produce on any State land shall be guilty of an offence and on conviction shall be punished with a fine not exceeding five hundred thousand ringgit and to imprisonment for a term which shall not be less than one year but shall not exceed twenty years.'

THE GROUNDS OF APPEAL

[5] The petition of appeal filed by the prosecution listed the following four grounds of appeal:

(i) The Honourable Sessions Court Judge has erred in fact and/or in law in finding that 1st and 2nd Respondents were not physically working on site;

(ii) The Honourable Sessions Court Judge has erred in fact and/or in law in reliance of IDD5 (Timber Extraction Agreement dated 26.09.2016 between Better Green Sdn Bhd and Sykt Jadigaya Enterprise);

(iii) The Honourable Sessions Court Judge has failed to appreciate the relationship between DW4/ Sykt Jadigaya Enterprise /Sykt Mekar Mulia and the 1st and 2nd Respondents; and

(iv) The Honourable Sessions Court Judge has failed to take into account Exhibit P49 in relation to the two excavators bearing registration numbers SAB3022E and SS5008P.

THE PROSECUTION'S CASE

[6] The learned sessions court judge ('the LSCJ') had, in his grounds of judgment, set out the background of the case, for which I do no better than reproduce below.

[7] On 18 November 2017, the Ranau District Forestry Officer, PW3 received information via satellite image sent via WhatsApp application from an NGO (Non-Governmental Organisation) which suspected that there had been an intrusion in the FMU5 area of Trus Madi Forest Reserve.

[8] The next day on 19 November 2017, PW3 together with his team conducted a field inspection at the site of the complaint. At the location PW3 observed signs of logging activities such as log production roads, log extraction roads and landings (log storage sites) as well as 378 logs.

[9] Using GPS (Global Positioning System), PW3 found that the logging activities had encroached into the Trus Madi Forest Reserve (FMU 5) area. PW3 later lodged a police report of his findings.

[10] On 21 November 2017, the Chief Forestry Assistant of Mukim, Mangkawagu, Forest Ranger, PW6 together with the Tongod District Forestry Officer, PW5 went to the site and later confiscated the felled logs and two excavators suspected to be involved in forest offences. A police report on the seizure was made by PW6.

[11] A detailed investigation in the field later confirmed that there had been illegal logging activities of about 116.95 hectares in the Trus Madi Forest Reserve area. The investigation also found illegal logging activities in approximately 50.99 hectares in the surrounding State land area.

[12] Subsequently, 503 tree stumps were found in the Trus Madi Forest Reserve while a total of 54 stumps were found in the Kampung Lalampas, State land area. The investigation also revealed that the access road to the illegal logging sites originated from the logging area licensed to one Kekal Eramaju Sdn Bhd ('KESB') and that there were no other logging roads or any other roads other than that road. KESB's logging area was either adjacent or was situated next to the boundary lines of the two areas which had been encroached.

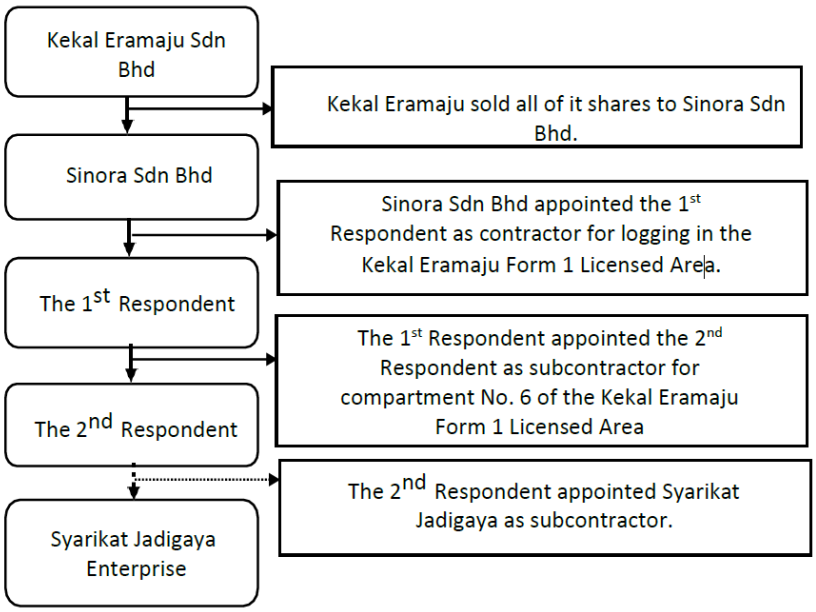
THE RELEVANT ENTITIES

[13] To understand the case better, it was relevant to first understand the relationship of the parties to one another.

[14] Firstly, there was KESB. The company was the holder of a Temporary Occupation License ('TOL') to log in an area of 10,000 acres (later 7,652.88 acres after surveyed) of state land in Kg Lalampas, Tongod. Subsequently, KESB sold all its shareholdings to Sinora Sdn Bhd ('Sinora') on 15 June 2016.

[15] On 1 July 2016, KESB entered into an agreement with Sinora to sell all of the logs in their licensed area. Two days later, on 3 July 2016, Sinora appointed the first respondent as its contractor to log in the KESB's licensed area. The first respondent in turn appointed the second respondent as the subcontractor to log in compartment No 6 of KESB's licensed area. According to the respondents, the second respondent further appointed Sykt Jadigaya Enterprise ('Jadigaya') a business owned by DW4 to log in the said compartment No 6 as its subcontractor.

[16] Learned deputy public prosecutor ('DPP'), has produced in his written submissions the following diagram on the relationship of the parties which I found to be most useful:


Kekal Eramaju Sdn Bhd
Kekal Eramaju sold all of it shares to Sinora Sdn Bhd.
Sinora Sdn Bhd
Sinora Sdn Bhd appointed the 1st Respondent as contractor for logging in the Kekal Eramaju Form 1 Licensed Area.
The 1st Respondent
The 1st Respondent appointed the 2nd Respondent as subcontractor for compartment No. 6 of the Kekal Eramaju Form 1 Licensed Area
The 2nd Respondent
The 2nd Respondent appointed Syarikat Jadigaya as subcontractor.
Syarikat Jadigaya Enterprise

THIS COURT'S DECISION

Principles in appellate intervention

[17] Before considering the merits of the appeal, this court reminded itself of its power and duty in sitting as an appellate court.

[18] Section 316 of the Criminal Procedure Code ('the CPC') provides that:

> At the hearing of the appeal the Judge may, if he considers there is no sufficient ground for interfering, dismiss the appeal, or may —
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> (a) in an appeal from an order of acquittal, reverse the order, and direct that further inquiry be made, or that the accused be re-tried, as the case may be, or find him guilty and pass sentence on him according to law;
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> (b) in an appeal from a conviction or in an appeal as to sentence —
>
> (i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried; or
>
> (ii) alter the finding, maintaining the sentence, or with or without altering the finding reduce or enhance the sentence or alter the nature of the sentence;
>
> (c) in an appeal from any other order, alter or reverse such order.

[19] In the Court of Appeal case of *Periasamy a/l Sinnappan v Pendakwa Raya* [1996] 2 MLJ 557; [1996] 3 CLJ 187 Gopal Sri Ram JCA (as he then was) had stated:

> In the state of the law, what was the duty and function of the learned judge on appeal? His duty and function have been the subject of discussion in a great many cases and for purposes we find it sufficient to refer to two of these.
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> In *Lim Kheak Teong v Public Prosecutor* [1985] 1 MLJ 38, the Sessions Court acquitted the accused on two charges under the Prevention of Corruption Act 1961, after having heard his defence. On appeal, the High Court set aside the order of acquittal and substituted therefore an order of conviction. The accused applied under the now repealed s 66 of the Courts of Judicature Act 1964 to reserve a question of law. In allowing the application and quashing the conviction, the Federal Court, whose judgment was delivered by Hashim Yeop Sani FJ (later CJ Malaya) said:
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> > [W]e gave leave because firstly we felt that there was no proper appraisal of *Sheo Swarup v King-Emperor AIR* 1934 PC 227 and secondly purporting to follow Terrell Ag CJ in *R v Low Toh Cheng* [1941] MLJ 1, the appellate judge went into conflict with the trend of authorities in similar jurisdictions.
> >
> > With respect, what Lord Russell of Killowen said in *Sheo Swarup* was that although no limitations should be placed on the power of the appellate court, in exercising the power conferred 'the High Court should and will always give

proper weight and consideration to such matters' as:

(1) the views of the trial judge on the credibility of the witnesses;

(2) the presumption of innocence in favour of the accused;

(3) the right of the accused to the benefit of any doubt; and

(4) the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses.

Lord Reid reiterated this same principle in *Benmax v Austin Motor Co Ltd* [1955] AC 370*, 375* where he quoted from Lord Thankerton's judgment in *Thomas v Thomas* [1947] 1 All ER 582, that:

> Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion. The learned appellate judge held that the learned President had 'misdirected himself on the explanation of the accused.' Given the facts as stated in the appeal record, can it be said that there was a misdirection? Or can it be said that the decision of the learned President was 'plainly unsound'? (*Thomas v Thomas (supra)*). On the facts of this case we do not think so.

In *Wilayat Khan v State of Uttar Pradesh* AIR 1953 SC 122, 123, 125, Chandrasekhara Aiyar J, when delivering the judgment of the Supreme Court said:

> Even in appeals against acquittals, the powers of the High Court are as wide as in appeals from conviction. But there are two points to be borne in mind in this connection. One is that in an appeal from an acquittal, the presumption of innocence of the accused continues right up to the end; the second is that great weight should be attached to the view taken by the sessions judge before whom the trial was held and who had the opportunity of seeing and hearing the witnesses.
>
> ...
>
> Interference with an order of acquittal made by a judge who had the advantage of hearing the witnesses and observing their demeanour can only for compelling reasons and not on a nice balancing of probabilities and improbabilities, and certainly not because a different view could be taken of the evidence or the facts.

[20] Further, this court was reminded that the appellate court is to be slow to disturb the factual findings of the trial court unless there are compelling reasons to do so — see *Public Prosecutor v Abdul Rahman Mohamad* [2005] 1 CLJ 700 and that it is the trial court that has the advantage of seeing and hearing the witnesses — see *Public Prosecutor v Wan Razali Kassim* [1970] 2 MLJ 79; [1970] 1 LNS 121.

[21] It is also trite law that an appeal being a continuation of proceedings by way of rehearing empowered the appeal court to review all the available evidence as adduced before it — see *Agudosi Ikenna Emmanuel v Public Prosecutor* [2016] 2 MLJ 596.

ANALYSIS

[22] The LSCJ had, at the end of the prosecution's case, found that a prima facie case had been established. The LSCJ had held that the following ingredients which were to be proved under the charges had been made out:

(i) There has been a logging activity of a total of 503 trees (Forest Production @ forest produce) in the Trus Madi Forest Reserve, in Tongod district and logging activities of a total of 54 trees in the Kg. Lalampas Government Land area, in Tongod district;

(ii) the logging of trees in the Trus Madi Forest Reserve/Government Land area does not have the authority of permission or valid license under the provisions of the Forest Enactment Act 1968; and

(iii) both accused are responsible for the felling of the trees in the Forest Reserve/Government Land.

[23] In my judgment, there was no error on the part of the LSCJ's prima facie findings. In any event, there was no suggestion by learned counsel for the respondents to the contrary. The only issue was whether the LSCJ was correct in his evaluation of the evidence led by the defence as against the prosecution's which the LSCJ had found to have established a prima facie case. In particular, this appeal called for a consideration whether the sessions court erred in having accepted the defence of the respondents and concluding that they had raised a reasonable doubt in the prosecution's case.

[24] It would appear from his grounds of judgment that the LSCJ was highly persuaded by the testimony of DW4 who gave evidence that the two excavators which were at the location of the illegal logging site and seized by the Forestry Department were owned and registered under Sykt Mekar Mulia ('Mekar Mulia') a business owned by DW4 and not under either of the respondents. The LSCJ also found support for his findings in exhs 'D6' and 'D7' which were the registration cards of both seized excavators and which showed that the said excavators were indeed registered under Mekar Mulia. These evidence, according to the LSCJ managed to raise reasonable doubt in the prosecution's case namely that the respondents were not the parties physically working at the site where logs were felled.

[25] Thus, as correctly submitted by learned DPP the only issue before this court in this appeal was whether the respondents were responsible or otherwise for the illegal logging activities.

[26] During the prosecution's case, PW3 had testified that on 21 November 2017, he had gone to the location with PW5 and seized the felled logs and two excavators suspected to be involved in the illegal logging.

[27] PW5 had given evidence that based on his knowledge and understanding, the licensed area near to the boundary of the Trus Madi Forest Reserve was issued to KESB and the licence was valid from 5 September 2016 to 1 June 2018. PW5 also said that as far as he was aware, the first respondent was the contractor working in the said licensed area but was unsure whether they had engaged a subcontractor.

[28] According to the investigating officer, PW10, his investigation found that Sinora had engaged the first respondent as a contractor to carry out logging in the Lalampas Area vide a Timber Extraction Agreement dated 3 July 2016. In turn, by a Timber Extraction Agreement dated 19 September 2016, the first respondent engaged the second respondent as the subcontractor ('P49(1–5)') in compartment No 6. Sinora and the first respondent further entered into a Timber Extraction Agreement dated 1 September 2017 to extract and remove logs in the FMU5 Trus Madi Forest Reserve.

[29] PW10 also testified that based on site inspection including using drone surveillance, it was found that the encroachment into the forest reserve and the state land originated from the network of road from the area licensed to KESB. There were no other roads connecting to the areas encroached besides the one from KESB's licensed area. There were also no other third party found during the raid and inspection and the excavators found and later seized were within the control and custody of KESB's contractors. PW10 also noted that the respondents had not at any time reported of any encroachment by a third party while they were carrying out their loggings there.

[30] From my own assessment of the prosecution's evidence as enumerated above, I was of the view that there was no error on the part of the LSCJ in coming to the conclusion that a prima facie case had been made out. But was the LSCJ correct in concluding that the respondents had raised a reasonable doubt by the evidence that they led?

[31] DW1 was a shareholder and director of the second respondent. He testified that he was asked to 'help' PW4 who was a director of KESB to extract timber from their timber concession but that he did not do it himself but instead had engaged Jadigaya as a subcontractor to do so vide a Timber

Extraction Agreement dated 26 September 2016 ('IDD5'). DW1 said that the two excavators seized belonged to Mekar Mulia which business was owned by DW4 who also owned Jadigaya. He said he did not know whether DW4 had extracted timber beyond KESB's licensed area but that he could confirm that DW4 would 'follow the strict terms of the Timber Extraction Agreement'.

[32] DW2 was the director of the first respondent. He was also a director of KESB when the company's shares were bought over by Sinora. His evidence was that the first respondent and the second respondent were only the contractor and sub-contractor respectively under the agreements they signed but that the physical works were carried out by Jadigaya.

[33] Next was DW3, a manager in the first respondent. He said he oversaw and supervised the logs extraction works at KESB's concession area to ensure that the works were done properly and within the licensed area. His evidence was largely on the boundary issues which will be dealt with at the later part of this judgment.

[34] DW4 testified that he operated two sole proprietorship businesses, namely Mekar Mulia and Jadigaya. He further testified that Jadigaya had entered into a Timber Extraction Agreement dated 26 September 2016 with the second respondent to log in KESB's concession area. However, he said his workers were stopped and his excavators were seized by the Forestry Department for suspicion of illegal logging activities in the Trus Madi Forest Reserve. He tendered the registration cards of the two excavators with the registration numbers SAB3022E ('D6') and SS5008P ('D7') which both showed Mekar Mulia as the registered owner.

[35] DW4 denied having illegally felled or cut trees in the Trus Madi Forest Reserve. He said he had only logged within the boundary lines as demarcated by boundary stones and pegs and the trees painted in red.

[36] There was no dispute that the two excavators seized were indeed registered in the name of Mekar Mulia as evidenced by exhs 'D6' and 'D7'. Learned DPP contended that the LSCJ erred when he accepted these evidences without testing them against the prosecution's evidence. Further, it was submitted that the LSCJ had also erred in preferring the evidence of DW4 against the evidence of PW5, PW6 and exh 'P49'.

[37] Firstly, in a nutshell, the defence of the respondents was 'it was our subcontractor, Jadigaya, who was carrying out the logging activities and that the excavators were owned by Mekar Mulia'. This defence's version, according to learned DPP was never put to any of the prosecution's witnesses, contrary to a long line of decided cases including the oft-quoted *Alcontara*.

[38] Indeed, I had scrutinised the notes of proceeding and I could not find any reference to Jadigaya during the prosecution's case. It was only when DW1 took the stand that Jadigaya was first referred to. Neither was it suggested to any of the prosecution's witnesses that the two excavators belonged to Mekar Mulia. Similarly, Mekar Mulia was only mentioned when DW1 testified. A B

[39] It was submitted by learned counsel for the respondents that by DW1's evidence (see Q/A5–14, DWS1), PW10 must be taken to have known that it was Jadigaya who had carried out the timber extraction works. Respectfully, learned counsel's contentions were misconceived as this proposition was never put to PW10 during his cross-examination. Thus, I found merits in the submissions by learned DPP that the LSCJ ought to have considered this fact when arriving at his conclusion. C

[40] A maximum evaluation of the evidence, in my view, required the appreciation that for the defence to carry weight, it needed to be tested against the evidence of the prosecution. This naturally involved having to cross-examine and challenge the prosecution's witnesses that the defence's version of events was more probable than what the prosecution's witnesses had testified to. Failure to do so would invite the court to infer that the belated defence was a recent invention and an afterthought. D E

[41] Next, learned DPP submitted that the LSCJ had erred in taking into consideration the Timber Extraction Agreement dated 26 September 2016 between the second respondent and Jadigaya ('IDD5'). It is trite law that evidence do not become admissible evidence unless and until they are tendered and admitted as exhibits. Evidence marked as 'ID' or in this case 'IDD' is only for the purpose of identification during the course of the trial but there is a required final step of converting the ID or IDD to an exhibit before it becomes part of the admissible evidence before the court for it to be given any weight. F G

[42] The law relevant to this issue is settled — see *Pendakwa Raya v Norizdham Faridzuan bin Yazet* [2016] MLJU 307 and *Youganesparan a/l Muniandy v Public Prosecutor* [2021] MLJU 297. H

[43] In *UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2018] supp MLJ 363; [2010] 9 CLJ 785, one of the questions before the Federal Court was 'whether the Court of Appeal can draw inferences on documents, the authenticity of which were challenged at the trial and which were not proven by the makers of the said documents'. I

[44] The Federal Court held as follows:

A [32] The disturbing feature of the judgment of the Court of Appeal is that, it had relied on some disputed documents, which had been challenged at the trial, as the basis of reversing the findings of facts of the trial judge. Two clear examples are the subcontract of the Sheraton-Hanoi Project and the alleged fax from GIE's accountant.

B [33] With regard to the the subcontract of the Sheraton- Hanoi Project, the Court of Appeal relied on its content extensively when reversing I the finding of the trial judge that US$13,859,484.10 or RM52,666,040 due to UEG had having surreptitiously diverted by Seow to his own company in Singapore GIE ...

C [34] With utmost respect, we believe that the reason why the trial judge did not make any reference to the subcontract in his judgment is because the authenticity of the subcontract was challenged by UEM. At the trial, the subcontract was marked only as an 'ID' as its maker was never called. Thus, how could the Court of Appeal accept and rely upon a document in toto without even considering the issue of its authenticity, when its authenticity had been expressly challenged in the High Court as well as in Court of Appeal.

D

[45] While learned counsel for the respondents was correct to point out that the basis for the LSCJ's decision was the two registration cards ('D6') and ('D7'), the LSCJ did refer to IDD5 in his grounds of judgment. The problem E with this was that as pointed out by learned DPP, had the LSCJ not considered IDD5 at all, there would not have been any supporting evidence for the defence to contend that Jadigaya was allegedly the one who carried out the timber extraction works. Also, IDD5 was likewise not referred to any of the prosecution's witnesses thus deprived the prosecution from presenting any F rebuttal evidence against it.

[46] Next, learned DPP cited s 32(1) of the Enactment which reads as follows:

G Any person who would have been guilty of a forest offence if anything had been done or omitted by him personally, shall be guilty of such offence and liable to the penalty prescribed therefor if such thing has been done or omitted by his partner, agent or servant unless such person proves to the satisfaction of the Court before which he is charged that he took all reasonable precautions to prevent the doing or omission of such thing, provided that nothing in this subsection shall affect the H liability of such partner, agent or servant; ...

[47] Learned DPP contended that even if the respondents' defence that it was Jadigaya which was carrying out the timber extraction works, Jadigaya, being their agent or servant, would still attach liability on the respondents. As I noted earlier, the relationship between the parties was not in much dispute. DW2 best summed it up when he testified as follows:

Therefore I can confirm that Maxland Sdn Bhd and Better Green Sdn Bhd were only the timber extraction contractor and subcontractor by reasons of the respective Timber Extraction Agreements signed and exhibited by the Prosecution in this case.

But the actual contractor physically carrying out the timber extraction evidenced by the two excavators exhibited in this trial was Sykt Jadigaya Enterprise belonging to one Chia Hon Kong.

[48] The law expressly provides that the principal, in this case, the respondents, would be liable for the illegal acts of their agents or servants, in this case, Jadigaya. Thus, it was for the respondents in their defence to bring evidence to prove to the satisfaction of the court that they took all reasonable precautions to prevent the illegal felling by Jadigaya. As correctly pointed out by learned DPP, no evidence was led on this matter.

[49] I did take note of the submissions by learned counsel for the respondents that the prosecution was blowing hot and cold by first making an issue of IDD5, which according to the respondents showed the relationship between the respondents and Jadigaya and on the other hand, contending that Jadigaya was an agent or servant of the respondents. Respectfully, I found no merits in the submissions. The prosecution was rightly entitled to poke holes in the respondents' defence in the alternative. Either way, I respectfully found that the prosecution had managed to do so that it could not be said that the respondents had, by their evidence, raised reasonable doubt.

[50] Lastly, on the finding and seizure of the two excavators. No doubt they were registered under Mekar Mulia. However, learned DPP has referred the court to exh 'P49' which was the agreement between the first and second respondents whereby the first respondent appointed the second respondent as the subcontractor to carry out logging works in KESB's licensed area. The two excavators were amongst the equipment listed in the Equipment Schedule of the said agreement. By cl 1.1 of the agreement, the second respondent agreed to deliver the equipment listed therein including the two excavators to the first respondent's timber camp at Lalampas, Tongod. By cl 1.6, the first respondent was to pay RM100,000 to the second respondent as mobilisation costs upon the said equipment arriving at the camp site.

[51] Thus, by the terms of the said agreement, notwithstanding the registration of the two excavators under Mekar Mulia, as learned DPP submitted, the custody and control of the two excavators were with the respondents. I did find merits in the submissions as if indeed the respondents had nothing to do with Mekar Mulia or Jadigaya, it begged the question why they agreed to contractually bind themselves to not just any excavators but the very two excavators which were later found to have been on site where the illegal felling was.

[52] As there was no doubt that the two excavators were found together with the felled logs in the areas encroached, the presumption under s 38(8) of the

Enactment applied. It reads as follows:

> Where in a prosecution for a forest offence under —
>
> (a) subsection (2) of section 20
>
> (b) paragraph (b) of subsection (1) of section 23 or
>
> (c) subsection (2) of section 23,
>
> against the holder of a licence or licence agreement, his agents or servants, it is alleged that such person did cut, collect, convert, fell or remove any forest produce illegally, it shall be presumed until the contrary is proved that he did cut, collect, convert, fell or remove such forest produce illegally, if it is proved that timber extraction routes, paths or roads exist between the area under his licence or licence agreement and the area in which the illegal cutting, collection, conversion, felling or removal of the forest produce is alleged to have been committed.

[53] Now, it will be remembered that PW10 had testified that the encroachment into the forest reserve and the government land originated from network of road from the area licensed to KESB and that there were no other roads connecting the areas encroached besides the one from KESB's licensed area. There was also no other third party found during the raid and inspection and the excavators found and later seized were within the control and custody of KESB's contractor. The respondents merely gave evidence that their subcontractor would 'follow the strict terms of the Timber Extraction Agreement' and DW3 was tasked to, among others, ensure that the works were carried within the licensed area. However, and notably, the respondents fell short of leading any evidence to contradict PW10's above specific evidence.

[54] I had earlier on in [33] above alluded to DW3's evidence that he was tasked to ensure that the works were carried within the licensed area. Learned counsel for the respondents in his written submissions had contended that the LSCJ had not dealt with the issue of whether the alleged illegal logging was outside the boundary of the licensed area but that this issue gave rise to reasonable doubt in the prosecution's case. Learned counsel reproduced his submissions in the court below on this issue which in essence, put forth the proposition that the charges were defective as while the case for the prosecution was that the respondents were carrying on extraction activities outside the boundary of KESB's licensed area, that it was allegedly not stated in the charges.

[55] First of all, as noted earlier in this judgment, the LSCJ's decision in acquitting and discharging the respondents of the charges was premised solely on his findings that the respondents had raised reasonable doubt with regards to the third ingredient of the offence.

[56] Secondly, having considered the charges and the evidence led by the prosecution, I found no merits in the submissions at all. In gist, the offences charged was for felling of logs in the two areas encroached without being expressly authorised by or under the Enactment. No doubt KESB was licensed to extract timber from the designated area of its licence, however, the charges were for the felling of the 503 and 54 trees in the forest reserve and the state land respectively for which neither KESB, Sinora nor the respondents were authorised under the Enactment. Thus, the contention that the charges did not mention that the respondents were working or operating outside the boundary of KESB's licensed area was misconceived.

[57] Similarly, the contention that the evidence led by the prosecution did not prove the charge was without merits. The LSCJ had made a finding that based on the evidence led, the boundaries for the licensed area had been marked when the measurement was carried out in 2016 and that the boundary markings had been destroyed in the logging works. In particular, the LSCJ referred to the evidence of PW11 and PW8.

[58] Indeed, PW11's evidence was that he had carried out the initial surveying works and boundary marking in respect of KESB's licensed area and that at all material time, representatives from KESB were also present. After the encroachment was discovered, PW11 was again asked to go with the Forestry Department team and representatives from KESB to the site. PW11 said that he discovered that all the boundary markers which he had initially constructed had been destroyed by logging activities. All these were not challenged in cross-examination at all. DW3's evidence on this issue did not raise reasonable doubt in PW11's above evidence as DW3's testimony was after the fact, i.e. on the condition of the boundary markings after the encroachment happened when he had gone with PW10 and others to check the site.

CONCLUSION

[59] Having regards to all of the above, it was this court's judgment that all the ingredients of the charges have been made out and that the LSCJ had erred in concluding that the respondents had, by their evidence, raised reasonable doubt in the prosecution's case.

[60] I therefore allowed the prosecution's appeal and consequently, convicted the two respondents of the charges preferred against them as amended.

A MITIGATION AND SENTENCING

[61] Learned counsel for the respondents mainly confined the respondents' plea of mitigation on the contentions that the other entities ie KESB, Sinora and PW4 were the true and real parties who benefitted from the acts of the first and second respondents. Learned counsel contended that while the prosecution has the prerogative to prefer any charges against anyone, in this case the prosecution has led evidence to show that they had 'excused' KESB, Sinora and PW4 and considered them as 'innocent'.

[62] In summation, learned counsel prayed for nominal fines as the respondents allegedly did not benefit from their unlawful act.

[63] In advocating for a heavier sentence, learned DPP has urged upon this court to take into account the following factors:

(a) the objective of the Enactment which is for the preservation of the forests in the State of Sabah;

(b) public interest in ensuring the forests are protected in that the trees in the natural forests are the main source of oxygen that sustain life in the ecosystem, and which maintain the delicate balance of the micro and macro climates;

(c) the seriousness of the offence as reflected in the penalties provided under ss 20(2) and 23(2) of the Enactment;

(d) the number of trees felled in the illegal loggings by the respondents ie 503 trees in the Trus Madi Forest Reserve and 54 trees in the Kg Lalampas State Land; and

(e) the fact that the offences took place in a forest reserve which is a protected area.

[64] In support learned DPP cited the case of *Asia Ikhlas Sdn Bhd v Public Prosecutor* (Criminal Appeal SDK-42S-6/11 of 2015) (unreported) decided by Martin Idang J (as he then was) where His Lordship affirmed the sessions court judge's sentence on the fine of RM100,000 for each of the charge or RM200,000 in total for both charges. There were a total of 270 trees involved in the illegal logging in that case.

[65] Learned DPP also prayed that the court ordered the respondents to pay to the government the cost of rehabilitation of the forest reserve and the state land as provided under s 34(e) of the Enactment which states as follows:

> In addition to any penalty imposed for a forest offence, the convicting Court may order —

...

(e) that, where any Forest Reserve or State land has been damaged as a result of the commission of a forest offence, the offender shall pay to the Government the cost of rehabilitation of the Forest Reserve or State land. Such cost of rehabilitation may be determined by the Chief Conservator.

[66] In addition, learned DPP prayed for the forfeiture of the two excavators under s 38(11) of the Enactment. The provision states as follows:

(11) Any machine, equipment or conveyance as specified in the Schedule found in a Forest Reserve or State land shall be presumed to have been used or intended to be used to cut, collect, convert, fell, take or remove any forest produce without authorisation of the Chief Conservator unless the contrary is proved.

[67] Despite the court's prodding, there was no rebuttal submissions by learned counsel for the respondents on the learned DPP's submissions on their prayers for the additional orders, merely repeating that the respondents' position was that they were not liable.

[68] Firstly, with respect, this court had already handed down the conviction against the respondents, thus, any contentions on their non-culpability were, in my mind, to be reserved for their appeal, which learned counsel had already indicated they would be filing. The court was only to consider the appropriate sentence at this stage.

[69] For that reason, I was not persuaded by the mitigating factors put forth on behalf of the respondents. The prosecution was in law entitled to charge the respondents without also charging KESB, Sinora and or PW4. The only question was whether the prosecution could connect them to the crime. In this case, this court had found that to be so.

PUBLIC INTEREST

[70] In the case of *Tan Sri Abdul Rahim bin Mohd Noor v Public Proscutor* [2001] 3 MLJ 1, the Court of Appeal gave the following reminder:

It cannot be gainsaid that the most onerous function of any court is to decide the appropriate sentence in any criminal case. In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest. In that context the interest of justice should no doubt take into account the interest of the offender. But it is often forgotten that the interest of justice must also include the interest of the community. In assessing sentence the court should balance the interest of the offender with the interest of the victim and strike a balance, not, of course forgetting that the interest of the public should be the uppermost consideration.

[71] It would not be too far-fetched to state that once felled, the 557 trees would not be replaced anytime soon or at least in the lifetime of the parties involved in this case. Even if they were to be, the new trees would not mature so as to completely replace the said 557 trees. It would also not be a hyperbole to state that each and every person is not only a stakeholder but a guardian of the natural forests.

[72] The Right Honourable Chief Judge of Sabah and Sarawak, Tan Sri Dato' Abang Iskandar bin Abang Hashim in his speech at the launching of the 'Sentencing Guideline for Forest Crimes in Sabah' on 2 December 2021 had stated that:

> ... preventing and tackling forest crime is essential for sustaining all life on Earth. Organised crimes and corruption are among the many drivers of biodiversity loss. Addressing them requires concerted action by all parties who treasure our environment. No one holds any monopoly in this selfless and altruistic endeavour, so critical in achieving sustainable development.

[73] I was of the considered view that no one was in a better place to appreciate this than the respondents themselves, being on the ground, in the midst of the trees, some would have reached majestic heights that only age could ensure. It would also be not too burdensome to expect those in the respondents' shoes to be aware and be cautious of the Forest Reserve and their status. However, the respondents' obviously could not see the trees but only saw or chose to see, the dollars and cents in their stead. Thus, I was of the view that the respondents must be held accountable and the sentence must reflect such accountability for their actions.

PROPORTIONALITY

[74] In *Public Prosecutor v Mohamed Danny bin Mohamad Jedi* [2018] 6 MLJ 383 the Court of Appeal cited the case of *R v Ipeelee* [2012] SCC 13 which held that:

> ... the (proportionality) principle ensures that a sentence reflects the gravity of the offence ... Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender.

[75] In considering the proportionality of the sentence to be imposed, I was left with the question as to what was the worth of the 557 trees? Is one confined to the market value of the logs? Does one take into account the decades it took for the trees to reach their maturity? Or does one take into account the loss to the next generation?

[76] Learned counsel for the respondents was quick to remind the court that subsequently royalties were paid for the felled logs and suggested (at least from

my understanding of his submissions) that to impose the sentence would amount to a double recovery of sorts. Respectfully, such contentions missed the mark as to penalise the respondents by merely taking into account the royalties already paid would only serve to 'legalise' the illegal acts of the respondents. On the other hand, the Enactment clearly envisages that there would be cases where the fines provided thereunder may not be adequate and allows the court to impose other orders on conviction under s 34 of the Enactment. One of such orders is for the payment of royalties which would have been payable under the Enactment (see s 34(d)). Thus, the fact that the royalties had been paid was of no consequence at all.

[77] Learned DPP on the other hand referred to the unchallenged evidence by PW10 where he testified on the estimated loss arising from the illegal logging activities (Q/A10, PWS10):

> S10. Boleh beritahu Mahkamah berapakah anggaran nilai kerosakan hutan yang terlibat dalam pencerobohan dalam kes ini dan bagaimanakah anggaran penilaian tersebut kamu lakukan?
>
> J10. Memandangkan kawasan ekosistem hutan merupakan kawasan yang mempunyai pelbagai jenis kegunaan dan kepentingan semulajadi maka sebenarnya penilaian kerosakan disebabkan aktiviti pencerobohan seperti dalam kes ini adalah tidak ternilai (intangible).Walaubagaimanapun Kerajaan Negeri melalui Pekeliling Ketua Konservator Hutan CF:06/2019 telah menetapkan Yuran Ganti Rugi 'No Net Loss (NNL)' bagi kawasan Hutan Simpan yang terlibat musnah dalam projek pembangunan ialah RM250,000.00 sehektar tanpa mengira jenis dan kelas Hutan Simpan [Rujuk Folio No.59 pada folder ekshibit Pendakwaan]. Jika ketetapan nilai ganti rugi kemusnahan hutan tersebut digunapakai dalam penentuan nilai kerosakan hutan yang terlibat dalam kes ini maka adalah dianggarkan bahawa nilai hutan yang rosak akibat kes ini ialah RM41,985,000.00. Kiraan tersebut adalah bagi keseluruhan kawasan pencerobohan seluas 167.94 hektar yang melibatkan kawasan Hutan Simpan Trus Madi (116.95 Ha) dan kawasan hutan Tanah Kerajaan Kampung Lalampas (50.99 Ha). Jika dipecahkan mengikut status kawasan tanah hutan, nilai kerosakan pada Hutan Simpan Trus Madi yang terlibat dalam ialah RM29,237,500.00 manakala pada kawasan hutan Tanah Kerajaan kampung Lalampas adalah RM12,747,500.00.

[78] The estimated loss of RM41,985,000 as against the mere maximum penalty of RM500,000 provided in each of ss 20(2) and 23(2) of the Enactment was indeed sobering. It left me with the sense that proportionality could never be achieved on the facts of this case.

JUDGMENT AFTER A FULL TRIAL VS GUILTY PLEA

[79] While the court retains its discretion, generally, an accused is entitled to be given credit or discount for pleading guilty which is normally a third of what would otherwise be imposed — *Public Prosecutor v Sulaiman bin Ahmad*

[1993] 1 MLJ 74; *Public Prosecutor v Ravindran & Ors* [1993] 1 MLJ 45; *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167.

[80] In the present case, the respondents had claimed trial and was found guilty only upon the prosecution's appeal before this court. This court was therefore entitled to consider the expense and time involved as part of the factors in sentencing.

CUSTODIAL TERM?

[81] Both ss 20(2) and 23(2) of the Enactment provide for an imprisonment term of not less than one year and not exceeding 20 years.

[82] In the case of *Public Prosecutor v Lam Tshin Po & Ors* [1995] 4 MLJ 178; [1995] 4 CLJ 624, it was argued by the prosecution before Ian Chin J that s 20(2) of the Enactment imposes a mandatory custodial sentence and a fine. The learned judge referred to the Interpretation and General Clauses Enactment 1963 of Sabah and held that it is not mandatory to impose a custodial sentence notwithstanding that the particular penalty for an offence under the Enactment uses the word 'and' and that the court still has a discretion to impose a custodial sentence or otherwise.

[83] It is the law that when the accused is a body corporate, it is illegal to impose a default custodial sentence against the representative of the said corporation — see *The Coastal Bus Co Ltd v Public Prosecutor* [1962] 1 MLJ 324, *Public Prosecutor v Kasihku Sdn Bhd* [1991] 3 MLJ 116, *Dunlop Malaysia Industries Bhd v Public Prosecutor* [1985] 1 MLJ 313, *Edward Goh Geok Seng v Public Prosecutor* [1995] MLJU 539 and *Public Prosecutor v Prolific Yield Sdn Bhd* [2021] 10 MLJ 637; [2021] 6 CLJ 294.

[84] In *Public Prosecutor v Prolific Yield Sdn Bhd*, this court had the occasion to construe s 43 of the Environmental Quality Act 1974 which reads as follows:

> (1) Where an offence against this Act or any regulations made thereunder has been committed by a company, firm, society or other body of persons, any person who at the time of the commission of the offence was a director, chief executive officer, manager, or other similar officer or a partner of the company, firm, society or other body of persons or was purporting to act in such capacity shall be deemed to be guilty of that offence unless he proves that the offence was committed without his consent or connivance and that he had exercised all such diligence as to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances ...

[85] In that case, the sessions court had earlier on, upon the guilty plea of the accused/corporation, sentenced the accused to a fine and in default thereof imprisonment term. This court held that the custodial sentence was illegal and therefore set it aside.

[86] The same would apply in the context of the present case. Although the court has discretion to impose custodial sentence on top of the fine/s to be imposed, given that both respondents were not natural persons, it would not be within the law to do so.

[87] Perhaps recognising this, the prosecution prayed that the directors of the first and second respondents be found guilty of the offences charged pursuant to s 32(2) of the Enactment which provides that:

> Where a person convicted of a forest offence is a body corporate, every person who, at the time of the commission of such offence was a director, manager, secretary or other officer of such body corporate or was purporting to act in any such capacity, shall be guilty of that offence unless he proves that such offence was committed without his knowledge or that he exercised all due diligence to prevent the commission thereof.

[88] The short answer to this was that there would not have been any basis to do so for the simple reason that the prosecution had not chosen to jointly charge the respondents' director/s notwithstanding that the law allows for it. That being the case, at this stage of the proceedings, it was too late in the day to seek for such an order. More importantly, it would amount to a miscarriage of justice.

ORDERS

[89] Having regards to all the above, I therefore sentenced the respondents as follows:

(a) as regards the first charge under s 20(2) of the Enactment, a fine of RM400,000; and

(b) as regards the second charge under s 23(2) of the Enactment, a fine of RM150,000

[90] In addition, I ordered the forfeiture of the seized two excavators under s 37(1) and (10) of the Enactment and further ordered the respondents to pay to the government the cost of rehabilitation of the forest reserve and the state land under s 34(e) of the Enactment.

Appeal allowed.

Reported by Nabilah Syahida Abdullah Salleh